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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-224

JEROME SILVERMAN, As Administrator of the Estate of HAROLD NATHAN and ADELE NATHAN,
Appellants,

v.

LOUIS D. BROWNING, JAMES E. CRANE, WALTER A. CAMP, JOHN J. CLOONAN, GERALD A. SAVA, ST. JOSEPH'S HOSPITAL, THE HONORABLE J. P. RYAN, CLERK OF THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, FAIRFIELD COUNTY, STAMFORD, CONN., JUDGE OTTO H. LA MACCHIA and all the Judges of the Superior Court in Fairfield County, Stamford, Connecticut,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM PURSUANT TO RULE 16 OF THE REVISED RULES OF THE SUPREME COURT

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TABLE OF AUTHORITIES

Page

Anonymous, An Attorney v. *The Association of the Bar of the City of New York*, 515 F.2d 427 at 430 (2nd. Cir. 1975), cert. den. —— U.S. ——, 96 S.Ct. 122 (Oct. 6, 1975) 8

DeBacker v. *Brainard*, 396 U.S. 28, 32-33 (1969) 14

Norfolk and Western Railway Co. v. *Beatty*, 400 F.Supp. 234 (S.D. Ill. 1975), —— U.S. ——, 96 S.Ct. 439 (December 8, 1975) 5, 6, 7, 8, 15

Ramsey v. *United Mine Workers of America*, 401 U.S. 302 (1971) 14

Silverman v. *Browning*, 359 F.Supp. 173 (D. Conn. 1972) 4, 7, 8

COURT RULES:

Rule 16 of the Revised Rules of the Supreme Court 1

§ 15A, Connecticut Practice Book 3, 4, 13

§§ 223 and 652, Connecticut Practice Book 5

§ 601, Connecticut Practice Book 4

§ 762, Connecticut Practice Book 4

INDEX

	Page
MOTION TO DISMISS OR AFFIRM PURSUANT TO RULE 16 OF THE REVISED RULES OF THE SUPREME COURT	1
STATEMENT OF THE CASE	2
THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND SHOULD BE DISMISSED OR THE JUDGMENT AFFIRMED	6
A. REGULATION OF PRACTICE OF LAW IN STATE COURTS PROPERLY COMMITTED TO STATE JUDICIARY	7
B. DISMISSAL ALSO JUSTIFIED BY PRINCIPLES OF FEDERALISM AND COMITY IN LIGHT OF STATE COURT PROCEEDING	8
C. THE RIGHTS OF THE CLIENT SHOULD NOT BE CONFUSED WITH THOSE OF THE ATTORNEY	11
D. PLAINTIFF FAILED TO PRESENT ANY EVIDENCE WHATSOEVER IN THE STATE COURT IN SUPPORT OF HIS CLAIM OF "GOOD CAUSE"	12
E. ON THE MERITS, THE APPEAL DOES NOT WARRANT PLENARY CONSIDERATION	15
CONCLUSION	16
CERTIFICATE OF SERVICE	17

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM PURSUANT TO RULE 16 OF THE REVISED RULES OF THE SUPREME COURT

The Appellees below named respectfully move, pursuant to Rule 16 of the Revised Rules of the Supreme Court, to dismiss the appeal and, in the alternative, to affirm the judgment below on the grounds that: (a) it does not present a substantial federal question; (b) the federal question sought

to be reviewed was not timely or properly raised in the courts below; and (c) it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

This case concerns a protracted, collateral attack upon certain state court rulings in original civil actions commenced in the Superior Court of Connecticut. The rulings denied efforts of the appellants' attorney, a New York lawyer, to prosecute the Connecticut cases on a *pro hac vice* basis. The collateral attack took the form of a subsequent suit instituted in the federal district court below.

The involved history of this litigation is set forth in detail in the opinion of the three-judge district court, Jurisdictional Statement, pp. a-3 through a-11, as well as the opinion of the State Supreme Court, Jurisdictional Statement, pp. a-39 through a-44. The major developments, however, may be summarized as follows:

1. In 1968 two wrongful death actions for alleged malpractice and negligence were commenced in the Connecticut Superior Court for Fairfield County, returnable on the first Tuesday of August, 1968. (Jurisdictional Statement, p. a-39; A-583 Conn. Records and Briefs, Dec. Term 1974, 6-1).

2. In October, 1968, the Superior Court (Judge Bogdanski) over defendants' objection authorized Attorney Julien to take pre-trial depositions.

3. In May, 1969, in a separate action brought by the defendants, however, the Superior Court (Judge Tierney), after a hearing, entered an order enjoining Attorney Julien

from participating or assisting in the pre-trial preparation of the case or the trial, until he had complied with the rules and statutes pertaining to the admission of out-of-state attorneys.

4. In November, 1970, an application to allow Attorney Julien to try the case was denied by the Superior Court (Judge LaMacchia).

5. It was not until March, 1971, over two and one-half years after the state suits were brought, that the plaintiffs then filed the present action in federal district court to compel the state judges to reverse their rulings and allow Attorney Julien to participate in the malpractice cases.

6. The federal court (acting by a single judge) then ordered on April 29, 1971 that the state cases continue to be stayed and that the state court system be given an opportunity to issue a rule concerning *pro hac vice* practice in general. The basic requirements that such a rule should contain were also set forth by the federal court in its decision. In addition, the federal court retained jurisdiction, pending an appeal by the plaintiffs to the State Supreme Court on the *pro hac vice* issue.

7. A new rule governing *pro hac vice* practice was accordingly promulgated by the State Superior Court judges on June 21, 1971, as § 15A of the Connecticut Practice Book.

8. The federal court then denied a subsequent motion to dismiss and directed that the plaintiff seek to have the *pro hac vice* application considered under the new rule.

9. The plaintiff in renewing his *pro hac vice* application submitted no evidence whatsoever on "good cause" under

Rule 15A and no other subordinate facts were established by the plaintiff under this provision. Jurisdictional Statement, pp. a-27, a-28, a-51 — a-53.

10. The plaintiff without pursuing any state appeal at that time then sought to have a three-judge federal court enjoin the enforcement of the *pro hac vice* rule on the grounds of unconstitutionality. The majority of the three-judge court, however, voted to abstain so that the State Supreme Court on appeal could be afforded an opportunity to interpret the rule. Federal jurisdiction was nevertheless retained pending the state appeal. *Silverman* v. *Browning*, 359 F. Supp. 173 (D. Conn. 1972).

11. The plaintiff, however, instead of pursuing the state appellate remedies, appealed the federal abstention decision to the United States Supreme Court, which affirmed the judgment of the three-judge court. 411 U.S. 941 (April 23, 1973, Docket No. 72-1234).

12. It was only after that point that the plaintiff filed his appeal to the State Supreme Court on May 23, 1973, from the denial by the Superior Court of the *pro hac vice* application the year before. (Jurisdictional Statement, p. a-48).

13. Notwithstanding the fact that the appeal was almost a year late (§ 601, Connecticut Practice Book, limiting the appeal period to twenty days), the appeal was nevertheless considered by the State Supreme Court pursuant to § 762 of the Connecticut Practice Book, in order "to facilitate business and advance justice." (Jurisdictional Statement, pp. a-48 — a-49).

14. The State Supreme Court found no error in the action of the trial court on the basis that the plaintiff had

presented no evidence whatsoever in support of the application and the claim of "good cause." (Jurisdictional Statement, pp. a-51, a-54 — a-55).

15. Similarly, the Court declined to rule on the plaintiff's constitutional attack, on the basis that none of these questions were raised in the court below, as required by §§ 223 and 652, Connecticut Practice Book.

16. The State Supreme Court, however, construed the "good cause" provision of the *pro hac vice* rule broadly, stating that it was not limited to a pre-existing attorney-client relationship or the inability to secure local counsel, which were merely illustrations of good cause, not the exclusive criteria of it. (Jurisdictional Statement, p. a-56).

17. The plaintiff sought no review whatsoever in the United States Supreme Court of the decision of the State Supreme Court, either by appeal or petition for certiorari. Instead, he renewed his challenge before the three-judge federal court.

18. The federal court, based upon the recent affirmance of *Norfolk and Western Railway Co.* v. *Beatty*, 400 F. Supp. 234 (S.D. Ill. 1975), —— U.S. ——, 96 S.Ct. 439 (December 8, 1975), as well as the record in the State proceedings, dismissed the Complaint. The district court held that the regulation of the practice of law in the State courts was a matter properly committed to the state judiciary, and that intervention by the federal district court was inappropriate. It is this decision which is the subject of the present appeal.

• • •

Over eight years have now passed since the state actions were commenced. These have not yet been tried on the

merits. The named plaintiff, Jerome Silverman, resigned as administrator of the estate of Harold Nathan in April, 1972, and the widow, Adele Nathan, succeeded him as administratrix. Assuming that the state actions were listed as assets of the estate, settlement and final distribution of the estate have evidently been delayed all this time.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND SHOULD BE DISMISSED OR THE JUDGMENT AFFIRMED.

It is respectfully submitted that this case should not be set down for argument for a number of reasons. First, the regulation of the practice of law in the state courts is a matter properly committed to the State judiciary. The district court's conclusion in this respect is fully supported by the recent affirmance by the United States Supreme Court in *Norfolk and Western Railway Co.* v. *Beatty*, —— U.S. ——, 96 S.Ct. 439 (December 8, 1975), affirming 400 F. Supp. 234 (S.D. Ill. 1975). Secondly, the dismissal by the court below was particularly well-founded because of the previously instituted state court proceeding and principles of federalism and comity which thus applied.

In addition, both the state and federal proceedings were initiated to protect the rights of the plaintiff. Questions as to the right of an out-of-state attorney to demand admission *pro hac vice* have never been at issue and consequently are improperly raised on this appeal. Finally, the plaintiff failed to present any evidence whatsoever in support of his application for Julien's admission *pro hac vice*. The issue of the proper or improper application of a *pro hac vice* admission has therefore not been presented.

We wish briefly to discuss these matters further.

A. REGULATION OF PRACTICE OF LAW IN STATE COURTS PROPERLY COMMITTED TO STATE JUDICIARY.

As the court below observed, state courts possess the inherent power to regulate the practice of law within their jurisdiction. (Jurisdictional Statement, p. a-28). The district court relied upon *Norfolk and Western Railway Co.* v. *Beatty*, *supra*, in which the Illinois federal three-judge court dismissed a challenge to a comparable state *pro hac vice* rule. The Illinois court referred to the prior *Silverman* decision and Judge Smith's dissent, stating:

> ". . . In this dissent, he stated, 'The admission to practice before the state courts in ordinary civil actions before them is a matter for those courts, with which we should not unnecessarily interfere.' 359 F. Supp. at 180.
>
> "The dissent goes on to suggest 'that a more liberal admission policy more in tune with modern specialization and mobility would be desirable', but that that is a matter for the state to determine. No constitutional basis is found 'to grant a civil litigant, patient or other client the right to compel the admission of non-residents to the practice of law, medicine, or other profession within a state.' Id. at 181. . . .
>
> "To view it otherwise would be for this Court to create a limited federal or national bar and to impose it on the states. To do so would be in total disregard of the state's great interests in the control and supervision of the practice of law in its own courts through reasonable requirements for licensing and admission. As suggested

by the dissent in Silverman, such factors may suggest the desirability of a more liberal exercise of discretion by the judges under the present Illinois statute, or a modification of that statute to fit circumstances such as these, but those matters are considerations for the state and not this Court."

400 F. Supp. at 237-8.

As previously noted, the United States Supreme Court affirmed on December 8, 1975, —— U.S. ——, 96 S.Ct. 439, in a memorandum decision.

As the Court of Appeals for the Second Circuit has also ruled in respect to bar disciplinary proceedings:

". . . The state 'has a legitimate interest in determining whether [an individual] has the qualities of character and the professional competence requisite to the practice of law.' Baird v. State Bar of Arizona, 401 U.S. 1, 7, 91 S.Ct. 702, 706, 27 L.Ed.2d 639 (1971). Indeed the state's responsibility in these matters is primary. . . ."

Anonymous, An Attorney v. *The Association of the Bar of the City of New York*, 515 F.2d 427 at 430 (2d Cir. 1975), cert. den. —— U.S. ——, 96 S.Ct. 122 (Oct. 6, 1975).

B. DISMISSAL ALSO JUSTIFIED BY PRINCIPLES OF FEDERALISM AND COMITY IN LIGHT OF STATE COURT PROCEEDING.

As Circuit Judge Smith stated in his dissent in the prior *Silverman* case (which the *Norfolk and Western* court relied on):

". . . [I]t would appear that plaintiff's proper relief is by an appeal to the State Supreme Court, either from denial of the motion or from judgment in the malpractice action, and if necessary by certiorari to the United States Supreme Court. Our powers to stay state court proceedings are limited by statute, 28 U.S.C. § 2283, and by precedent. While § 1983 actions constitute an exception to the general § 2283 prohibition, Mitchum v. Foster, 407 U.S. 225, 95 S.Ct. 2151, 32 L.Ed.2d 705 (1972), if we cannot interrupt state proceedings when a defendant claims that a prosecution constitutes a serious violation of First Amendment rights, see Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971), I can perceive no reason for doing so here in a civil damage action.

"Mitchum, supra, makes it quite plain that although the § 2283 prohibition is not an absolute bar, traditional notions of comity and equitable jurisdiction still prevail. Comity requires some showing of immediate and irreparable harm before state proceedings will be enjoined. The showing here is far short of that requirement. . . ."

359 F. Supp. at 181, Jurisdictional Statement, pp. a-102 — a-103.

The impact of federal intervention upon the state court proceeding was further detailed by the State Supreme Court in the *Silverman* appeal as follows:

". . . While it is true as stated by Judge Clarie in his decision of April 29, 1971, that '[t]his suit presents the delicate question of the right of a qualified and licensed

out-of-state attorney to practice law in the state courts of Connecticut in a particular case,' adjudication of that question has been delayed and complicated by the successful efforts of the plaintiff to persuade the federal District Court to assume jurisdiction to intervene and issue orders with respect to the conduct of a trial court of this state in a matter over which the state trial court had original jurisdiction and was exercising that jurisdiction and whose exercise of jurisdiction was, in case of error, subject to rectification by appeal to this court and from this court to the United States Supreme Court. Recognition of the fact that the state trial court had primary jurisdiction to decide the question of Julien's admission is implicit in the April 12, 1972 judgment of the District Court, which directed the plaintiffs to 'proceed with all reasonable speed with an application in the Superior Court action entitled: Jerome Silverman, as Administrator, etc., v. Louis D. Browning, et al., for the admission of Alfred S. Julien as trial counsel pro hac vice.' Explicit in the same judgment was the order of the District Court which continued its order to stay other proceedings in the state court and its implied assumed jurisdiction of appellate review of such judgment as should be rendered by the Superior Court by its orders that '[t]his court will retain jurisdiction in this suit pending the outcome of the application in the State Court for leave to the plaintiffs to have Alfred S. Julien appear as trial counsel pro hac vice in their action' and that '[t]his matter may be brought on before this Court for further proceedings on the application of any party on notice to the others.'"

Jurisdictional Statement, pp. a-44 — a-45.

"[I]n the present case it was the state trial court which had and was exercising original jurisdiction subject on appeal to review by this court, and it is the federal court which then chose, nevertheless, to intervene and interfere with the continuing exercise of state court jurisdiction. Paraphrasing what we said in Hoblitzelle v. Frechette, supra, 265: 'The clear import of the District Court judgment is to assert complete direction and control of all aspects of . . . [the proceedings for the admission pro hac vice of Julien]. The plaintiffs . . . chose to invoke the jurisdiction of the District Court, and that court assumed jurisdiction even though the state courts were equally open to entertain the case [and were doing so]. Scott v. Germano, 381 U.S. 407, 409, 85 S.Ct. 1525, 14 L.Ed.2d 477. It is neither our province nor our wish, in this proceeding, to consider the assumption, the scope or the result of the exercise of that jurisdiction.' In considering the merits of this appeal, we are merely exercising the undoubted appellate jurisdiction which this court has over the judgment of a trial court in this state. . . ."

Id., at p. a-48.

C. THE RIGHTS OF THE CLIENT SHOULD NOT BE CONFUSED WITH THOSE OF THE ATTORNEY.

It is noted that the plaintiff has included as one of the questions presented in the appeal the following:

"Does Connecticut's *pro hac vice* rule infringe the Fourteenth Amendment's due process rights of *out-of-state attorneys* to appear as counsel in Connecticut on an isolated case basis and not as a regular practice where

there are no guidelines set under which out-of-state attorneys will be permitted to appear in the Connecticut state courts."

Jurisdictional Statement, pp. 15-16. (Emphasis added.)

Mr. Julien was not a party in either the federal or state court proceedings. As the State Supreme Court recognized a litigant may assert only his own constitutional rights. It would therefore appear inappropriate and pointless for the appeal to be given a full hearing for this reason also.

D. PLAINTIFF FAILED TO PRESENT ANY EVIDENCE WHATSOEVER IN THE STATE COURT IN SUPPORT OF HIS CLAIM OF "GOOD CAUSE".

It is also difficult to perceive what would be accomplished by providing full consideration of the appeal because plaintiff failed to present any evidence whatsoever in the state court as to the "good cause" issue. He claims that the Connecticut *pro hac vice* rule discourages "counsel of superior ability in a specialized field of law" from participating in the case. (Jurisdictional Statement, p. 60). Yet he did not offer any evidence at all in support of Mr. Julien's qualifications in the State Superior Court. As the State Supreme Court noted:

> ". . . It [the Superior Court] then found that the plaintiff made no showing that the application was 'a special or infrequent occasion,' that the only reason given by the plaintiff in open court on the hearing on the application was that the plaintiff 'desired' Julien to represent him, that no factual showing was made by the plaintiff at the hearing that Julien's representation would affect the personal or financial welfare of his client, that no showing was made at the hearing that the litigant was

> unable to secure the services of competent Connecticut counsel to try the case, and that the plaintiff failed to establish good cause under § 15A of the Practice Book. On the basis of these facts, the court reached the following conclusions of law: The plaintiff did not establish any subordinate facts to support his application under § 15A of the Practice Book; the plaintiff presented no facts to warrant a conclusion that good cause under § 15A had been established; the mere fact that a client desires out-of-state counsel to represent him in the courts of this state is not sufficient reason, in and of itself, to warrant granting such permission; and ''[g]ood cause' includes' showing that a pro hac vice permission given to an out-of-state attorney be in the best interests of his client, either personal or financial, and no such showing was made. . . .
>
> "The conclusions are inescapable both that no evidence whatsoever was submitted to the trial court to show 'good cause' why the application to admit Julien pro hac vice should be granted and that no claim of any violation of any constitutional right of the plaintiff was ever submitted to that court. Under these circumstances, we find no error in the conclusions reached by the court and in its denial of the application. . . .
>
> "For all its ramifications, this case is essentially one where the trial court found that the plaintiff had not sustained his burden of proof, and we find that there was no error in that conclusion of the court."

Jurisdictional Statement, pp. a-52 — a-53; a-54 — a-55; p. a-57.

And, as the federal court below observed:

". . . The colloquy between counsel and the Connecticut trial court discloses that no adversary type of evidentiary presentation was ever made or attempted. Plaintiff's counsel appeared to presume that once Attorney Julien's name was presented with the request for admission, the trial court would automatically infer that his presence would confer benefits upon his client which would legally constitute 'good cause.'"

Jurisdictional Statement, pp. a-27 — a-28.

Constitutional issues should be presented in a clear-cut manner and should be based upon a record of fact, not guesswork. See *Ramsey* v. *United Mine Workers of America*, 401 U.S. 302 (1971). It is inequitable to permit plaintiff to hold back his evidence from the state courts and then seek to overturn their rulings by an appeal. Such a maneuver only serves to vitiate the dual court system, federal and state. The failure to substantiate the application with facts in the trial court, coupled with the tactics of leapfrogging from one court system to another drags out the proceeding unnecessarily, at the expense of the client and all other parties. The basic prerequisites for hearing an appeal — namely, an adequately developed record, and raising the issues in a proper manner in the lower courts — are lacking. *Cf. DeBacker* v. *Brainard*, 396 U.S. 28, 32-33 (1969). Had the plaintiff appealed to the United States Supreme Court from the decision of the State Supreme Court, he would probably be barred by these considerations. He should not now be permitted to do indirectly what he could not do directly.

E. ON THE MERITS, THE APPEAL DOES NOT WARRANT PLENARY CONSIDERATION.

As to the constitutionality of the *pro hac vice* rule, § 15A of the Connecticut Practice Book, the recent affirmance by this Court in *Norfolk and Western Railway Co.* v. *Beatty, supra,* is all but dispositive. See, *e.g.*, Judge Clarie's opinion at a-27 — a-28. Furthermore, consideration of the consequences of the absence of the *pro hac vice* rule demonstrates that the rule clearly has a rational basis. Without a rule prohibiting or limiting practice by out-of-state attorneys, or, similarly, under Julien's proposed "isolated instance" rule, control over practice of law by such attorneys would be lost. In addition, without control over those practicing, Connecticut courts would be unable to insure that the practitioners be competent or that its directives be honored. Under the rule that the plaintiff proposes (Jurisdictional Statement at p. 61) any out-of-state attorney in "good standing" with his local bar could practice full-time in Connecticut without complying with the requirements for admission to the bar by simply representing each client only once, an "isolated instance". The effect of allowing such practice of law in Connecticut by unqualified attorneys would be to compromise the integrity of the separate state court system, creating the necessity for policing by the federal courts. Loss of state control over the practice of law in that state would create a "national bar" that would weaken the states' valid interest in competent practice before its courts. See *Norfolk and Western Railway Co.* v. *Beatty, supra,* at 237.

In short, the "fundamental question" as stated by the plaintiff (Jurisdictional Statement, p. 61) has been completely answered in *Norfolk and Western Railway Co.* v. *Beatty, supra.*

CONCLUSION

It is, therefore, respectfully submitted that the appeal be dismissed, or, in the alternative, that the judgment be affirmed, pursuant to Rule 16 of the Revised Rules of the United States Supreme Court.

Respectfully submitted,

DEFENDANTS-APPELLEES,
THE HONORABLE J. P. RYAN, CLERK OF THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, FAIRFIELD COUNTY, STAMFORD, CONN., and JUDGE OTTO H. LA MACCHIA and all the Judges of the Superior Court in Fairfield County, Stamford, Connecticut

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CERTIFICATE OF SERVICE

I, Barney Lapp, Attorney for the Appellees, The Honorable J. P. Ryan, Clerk of the Superior Court of the State of Connecticut, Fairfield County, Stamford, Connecticut, and Judge Otto H. LaMacchia and all the Judges of the Superior Court in Fairfield County, Stamford, Connecticut, certify that on the 10th day of September, 1976, I served a copy of the foregoing Motion by mailing, United States Mail, Postage Prepaid, to the following attorneys of record:

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